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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

Nos. 34 • 35 and [illegible]

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner,

vs.

WILLIAM KUHN,

Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRITS OF CERTIORARI.

EARL D. PARKER,
GEORGE D. NYE,
Attorneys for Respondent.

TOOTHAKER & RODENFELS, Law Printers, Columbus, Ohio.

INDEX.

Subject Index.

Statement of case 1
The evidence 3
Argument 5
Ohio rule of peremptory order 5
Federal rule of peremptory order 9

Table of Cases.

Hallstein v. Penna. R. Co., 30 Fed. (2d), 594 10
Lehigh Valley R. Co. v. Skoczyla, 278 Fed., 378 10
Maslek v. Penna. R. Co., 26 O. App. Reports, 520 8
Northern Pacific Railroad Co. v. Egeland, 163 U. S., 93 6
Schnable v. C. C. C. & St. L. Ry. Co., 102 O. S., 97 8
Seaboard v. Horton, 233 U. S., 492, and 239 U. S., 595 10
Tuck v. Chapple, 115 O. S., 145 ..... 8, 9
Van Dusen Gas & Gasoline Engine Co. v. Schelies, 61 O. S., 298 ..... 5, 10
Vignola v. N. Y. Cent. Rd. Co., 102 O. S., 194 8

IN THE

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OCTOBER TERM, 1930.

Nos. 797 and 798.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner,

vs.

WILLIAM KUHN,

Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRITS OF CERTIORARI.

May It Please the Court:

STATEMENT OF FACTS.

At the time of the injury as alleged in the respondent's amended and supplemental petition, which occurred in February, 1926, respondent was employed on a section gang on The Chesapeake & Ohio Railway Company, the

petitioner in this case. On the morning of the injury the extra gang, of which respondent was a member, started out upon their regular duties in maintaining the right of way, and within an hour or so later one of the petitioner's agents, foreman Sturgell, came to the foreman then in charge of the gang in which respondent was employed and stated that they were having trouble with a spur track used by dump cars and an egine in hauling dirt to a waste dump. Mr. Sturgell, the foreman, was in a hurry because the dump cars had been jumping the track and it was necessary to cut two steel rails and place them in the track on this spur so that the dirt could be moved from a slide that had occurred on the main track.

Without exercising the customary precaution by providing the workmen with goggles, which were in the tool house some distance away, the foreman ordered the men to gang up around the steel rails and cut them to the required length.

The procedure in cutting the rails as used this particular day was for the men to stand in a half circle around another workman who held the chisel and be ready to relieve the man wielding the heavy sledge upon the chisel. This was very strenuous work and required several men to be in readiness for relief with the hammer. Just before respondent assumed the duty of striking with the hammer and while he was standing up close in obedience to his foreman's orders, a piece of chisel or rail chipped off and flew in his eye, thereby totally destroying the sight of the same and rendering it necessary to remove the eyeball.

THE EVIDENCE.

Foreman Sturgell commanded the men to:

> "Gang up and go in a hurry, that he wanted to get through there." (R., 22.)

Charles Hammerstein testified that foreman Sturgell commanded them to:

> "Step up close. Be ready to relieve the man that is hammering." (R., 74.)

Other witnesses testified to substantially the same thing on pages 40, 47, 54, 58, 61, 65, 66, 72 and 74 of the record.

Respondent stated that he was the next man to wield the sledge. (R., 78.)

George Mossbarger testified:

> "He said let's get this rail in right now. Kind of hurried around there. I think Bill, (meaning William Kuhn, the respondent) called him that morning about rushing things. I know he said something about it." (R., 72.)

Charles Hammerstein testified:

> "Likely there was some. Said some words. Anyway, I think Mr. Kuhn was a little like the rest of the boys, a little out of humor because we were kind of raw hided there that morning." (R., 76.)

Corbett Zimmerman testified:

> "We had orders to stand there, gang up around there and don't be afraid."

This peremptory order was made to all the workmen, including the respondent, because Corbett Zimmerman testified as follows:

> (Q) "Do you know whether the order included Mr. Kuhn, or not?"
> (A) "He said, 'all of you.' I reckon he did." (R., 41.)

Practically the entire force of men with whom the respondent was working at the time of the injury, some of whom are still employed by the railway company, have testified substantially to the same thing that Mr. Kuhn has stated in his testimony.

The railway company did not attempt to deny or refute any of the statements made by the respondent's witnesses concerning the work or the orders made when the injury occurred. Neither of the foremen mentioned in the case, namely, Mr. Sturgell or Mr. Bosworth, were called to rebut the testimony introduced by Mr. Kuhn and it therefore stands uncontradicted.

ARGUMENT.

Petitioner claims that the danger of cutting steel rails with defective tools and without the use of goggles was so open and obvious that respondent assumed the risk. We respectfully contend that the assumption of risk was avoided by respondent when he yielded his judgment to that of the foreman in charge, Mr. Sturgell, and acted in obedience to the peremptory order there made. In this order the workmen were commanded to:

> "Gang up and go in a hurry. That he wanted to get through there. Step up close. Be ready to relieve the man that is hammering. Let's get this rail in right now."

The foreman attempted to allay the fears of the respondent when he stated:

> "Gang up around and **don't be afraid.**"

Obviously respondent relied upon the judgment of the foreman and thus yielded his own judgment to that of the foreman, and by reason thereof sustained the injury complained of.

OHIO RULE OF PEREMPTORY ORDER.

The common law on the question herein involved was declared in Ohio by the case of the Van Dusen Gas & Gasoline Engine Co. v. Schelies, 61 O. S., 298, where Minshall, J., on page 309 of the opinion, says:

> "The clear result of the best considered cases is, that where an order is given a servant by his su-

perior to do something within his employment, apparently dangerous, and, in obeying, is injured from the culpable fault of the master, he may recover, unless obedience to the order involved such obvious danger, that no man of ordinary prudence would have obeyed it; and this is a question of **fact** for the jury to determine under proper instructions and not of law for the court." (Emphasis ours.)

Following this statement is a long list of cases, ending with Northern Pacific Railroad Co. v. Egeland, 163 U. S., 93, cited as the rule in the federal courts, and Judge Minshall adds, in pages 310 and 311:

"There is much reason in the rule that allows a favorable construction to be placed on the act of the servant in obedience to the order of his superior, though involving danger. Obedience to orders given by a master becomes a habit with the servant. He obeys without much questioning the prudence of the order. It is expected that he will do so and without such obedience the business of the master could not be successfully conducted. It is then both reasonable and proper that the master should be held to a reasonable responsibility for what he orders his servants to do; and the conduct of a servant in obeying an order, under such circumstances, should not be too closely criticized by courts in administering the law. Whilst the law will not excuse the servant, where the thing ordered is plainly and manifestly perilous, it will do so where a man of ordinary prudence, would, under the circumstances, have obeyed the order, although involving danger. A servant has the right, and is expected to rely somewhat on the superior knowledge and skill of one in authority above him. So that, in this case, whether Schelies was, under the circumstances, guilty of contributory negligence, was a question of fact for the jury under proper instructions from the court.

> At the time the injury occurred he was in the employ of the defendant as a 'vise-hand', and had been called by the foreman to assist in the adjustment of a portable gasoline engine with pump and circular saw attached. The saw was in motion at the time and not properly protected; and he was ordered to adjust the shafting of the pump, which was close and next to the saw. He suggested that it was not safe to do so without stopping the saw. The foreman **peremptorily renewed the order;** he obeyed, his clothing was caught by the saw and he was seriously injured. It was in evidence, that he had been called a short time before to assist the foreman in the same way, and had done so without injury. The defendant asked the court to instruct the jury that: 'If the master or one standing in the place of the master, as the foreman in this case, orders a servant to expose himself to a danger known and appreciated by the servant, and in executing such order the servant is injured, he cannot recover unless he shows that he was injured solely in consequence of such danger, and without fault or negligence on his part.' " (Emphasis ours.)

This instruction was refused, and the court instead instructed the jury:

> "That if the plaintiff was expressly ordered by the foreman to do the work that he undertook to do, the fact that it was dangerous would not preclude the plaintiff from recovery unless the danger was so obvious, and injury thereby was so **inevitable,** that a man of ordinary prudence would not obey if he was ordered by his employer to do it." (Emphasis ours.)

The case then was given to the jury under proper instructions as have been shown and the instruction asked by the defendant was properly refused.

The Schelies case was followed and approved in Schnable v. C. C. C. & St. L. Ry. Co., 102 O. S., 97, a federal liability case opinion by Marshall, C. J.

In Vignola v. N. Y. Cent. Rd. Co., 102 O. S., 194, a federal liability case, page 202, the Schelies case is again approved and followed and on page 204 the Egeland case, 163 U. S., 93, is also cited with quotations from it as follows:

> "The plaintiff would naturally, therefore, be inclined to obey the orders of such superior, particularly if they were not of an obviously very dangerous character."

The case of Tuck v. Chapple, 115 O. S., 145 (O. L. B. & R., Aug. 16, 1926), affirms the Court of Appeals of Cuyahoga county, on authority of the Schelies case.

In National Coal Co. v. Beresezem, the Court of Appeals of Cuyahoga county held (McCullough, 140):

> "A servant who goes into a place of known danger at explicit and imperative order of a superior, rather than lose his job, does not thereby assume the risk and is not guilty of contributory negligence, provided he uses ordinary care in obeying the command."

The stare decisis of Ohio law is contained in the case of Maslek v. Penna R. Co., 26 O. App. Reports, 520, which was affirmed by the Supreme Court of this state and reported in Volume 118, O. S. Reports, page 644. The court in that case held that the question of assumption of risk was one of fact for the jury under proper instructions from the trial court where a peremptory order had been shown.

In the cited case of Tuck v. Chapple, 115 O. S., 117, the Ohio Supreme Court held that the following language constituted a peremptory order:

> "Tie this wagon to George's (Chapple's) wagon, George's wagon has got a chain on it. Your wagon hasn't got no chain on it. And, George, take it down to the coal yard."

FEDERAL RULE OF PEREMPTORY ORDER.

The federal rule of assumed risk is the common law rule subject to all of the exceptions and qualifications and though limited by the federal employers' liability act, the defense of assumed risk is nowhere defined or described in that act.

It is important to note and keep in mind the inflexible rule that questions on which reasonable minds might differ are questions of fact for the jury under proper instructions for their determination and such questions are never questions of law for the determination of the court.

In the case of the Northern Pacific Railroad v. Egeland, 163 U. S., 93, it is held:

> "The defendant in error, plaintiff below, was a common laborer in the employ of the plaintiff in error. When returning from his work on a train, the conductor ordered him and others to jump off at a station when the train was moving about five miles per hour. The platform was about a foot lower than the car step. His fellow laborers jumped and were landed safely. He jumped and was seriously injured. He sued to recover damages for those injuries. Held that the court below rightly left it to the jury to determine whether he was guilty of contributory negligence."

As above stated this case is the basis of the decision of the Van Duzen Gas, Etc., Co. v. Schelies, 61 O. S., 310, which introduced the "peremptory order" exception to the rule of assumed risk in Ohio.

The case of Lehigh Valley R. Co. v. Skoczyla, 278 Fed., 378, is conclusive upon the instant case for the reason that it was decided **after** the two leading cases involving the question, or similar questions here involved, the Seaboard v. Horton, 233 U. S., 492, and 239 U. S., 595, and after the case of N. Y., N. H. and H. R. Co. v. Vizvari, 210 Fed., 118.

Both of these cases involved the question of assumption of risk and the court comments at length upon the scope and doctrine of assumption of risk.

The Skoczyla case analyzes the doctrine of the Vizvari and the Seaboard v. Horton cases. In the Skoczyla case the railroad company prosecuted error from the decision of the lower court for its refusal to hold that the employee assumed the risk as a matter of law and for refusing to take this question from the jury.

The court held that the trial court acted properly in refusing to instruct the jury that the employee assumed the risk as a matter of law.

Petitioner cites the recent case of Hallstein v. Penna. R. Co. (C. C. A. 6th) 30 Fed. (2d), 594 (Ohio, 1929). We respectfully contend that this case supports the respondent's contention for the reason that the court specifically states on page 596 of the opinion:

> "There was no promise to correct the omission, **nor were representations of the lack of danger,** upon

which he might have been justified in relying, **made to allay his fears.''** (Emphasis ours.)

In the cited case there was no such order as in the case at bar. In the instant case the workmen were ordered as follows:

''Gang up around and **don't be afraid.''**

Here was a glaring attempt on the part of the foreman to allay respondent's fears. Ours is a stronger case than the case of Lehigh v. Skoczyla, supra, because the foreman in that case did not assure workmen that there was no danger and, **to not be afraid.** This case, in substance, holds that the question whether the injured workman assumed the risk or whether he was justified in relying upon the judgment of the foreman, **was a question for the jury.**

The jury in the case at bar was properly charged on this question and found in favor of the respondent.

We, therefore, respectfully submit that upon authority of both the Ohio rule and the federal rule the petition should be denied.

All of which is respectfully submitted.

EARL D. PARKER,
GEORGE D. NYE,
Attorneys for Respondent.